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No. 98-7809

In The

Supreme Court of the United States

SALVADOR MARTINEZ,

Petitioner,

v.

COURT OF APPEAL OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of California

MOTION AND BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN PARTIAL SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Does a criminal defendant have a constitutional right to elect self-representation on direct appeal from a judgment of conviction?

MOTION OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN PARTIAL SUPPORT OF PETITIONER

The National Association of Criminal Defense Lawyers (NACDL) moves the Court under Sup. Ct. R. 37.3(b) for leave to file the enclosed brief *amicus curiae* in support of petitioner Salvador Martinez. This motion is necessary because petitioner has failed to consent to the filing of the *amicus* brief. In support of the motion, NACDL states the following:

1. NACDL is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

2. NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. NACDL is dedicated to the preservation and improvement of our adversary system of justice. Thus, the members of NACDL have a vital interest in ensuring that the integrity of the criminal justice system is protected.

3. The defense bar, many defendants, the prosecution, the judiciary and the public all have an interest in clarification of the law concerning self-representation on

appeal. We ask leave to file our *amicus* brief in the belief that it may assist the Court.

Dated: June 30, 1999

Respectfully submitted,

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN PARTIAL SUPPORT OF PETITIONER

This *amicus* brief is filed pursuant to Rule 37 of the United States Supreme Court. The respondent granted *amicus* consent to file this brief, and the petitioner failed to respond to several communications requesting permission to file. The respondent's letter of consent has been filed with the clerk of the court.

INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation which currently has a membership exceeding 10,000 attorneys with an additional 28,000 affiliate members in fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the House of Delegates. NACDL was founded forty years ago to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Among NACDL's stated objectives is the proper administration of criminal justice. Thus, the

[1] In conformity with Rule 37.6, NACDL informs the Court that no counsel for any party to this matter authored the brief in whole or in part, and that no person or entity other than NACDL made a monetary contribution to the preparation or submission of the brief.

members of NACDL have a vital interest in ensuring that the integrity of the criminal justice system is protected.

INTRODUCTION

The members of NACDL are committed to preserving the right to assistance of counsel on appeal. In most cases, assistance of counsel is essential to preparation of the appellate record and to a meaningful appellate review.

Nevertheless, the right to the assistance of counsel on appeal is meaningful only if the right to reject ~~the~~ advice of counsel is also recognized. Counsel should not be forced on an unwilling appellant. A lawyer cannot provide effective assistance of counsel against an appellant's wishes. The core values underlying the Fifth and Sixth Amendments require that criminal appellants who do not wish to be represented by counsel, and who are competent to waive their right to counsel and to represent themselves, be allowed to do so, at least to the extent of submitting *pro se* briefs and motions.

ARGUMENT

A. Criminal Appellants May Have a Constitutional Right to Represent Themselves on Appeal Whether or Not There Is a Constitutional Right to Appeal a Conviction.

The California courts have held that a defendant has no right to self-representation on appeal, among other reasons because there is no constitutional right to appellate review of criminal convictions. *See People v. Scott*, 64 Cal. App. 4th 550, 557 (1998) (citing *McKane v. Durston*, 153 U.S. 684, 687-88 (1894), and *Price v. Johnston*, 334 U.S. 266, 285 (1948)) (*overruled McCleskey v. Zant*, 499 U.S. 467 (1991)); *In re Walker*, 56 Cal. App. 3d 225 (1976). The right to represent oneself on appeal does not necessarily depend upon a constitutional right to an appeal, however. Moreover, it may be time to re-examine the underlying premise that there is no right to an appeal.

This Court's decisions holding that "there is no constitutional right to an appeal" rest in part on the historic fact that no appeal as of right existed in criminal cases for the first century after the Court was created. *Abney v. United States*, 431 U.S. 651, 656 (1977). The right of appeal as it has developed since the late nineteenth century is purely statutory. *Id.*[2] This history, and the absence of any express mention in the Constitution of a right to appellate review of criminal convictions, has led to the conclusion

[2] Appeals as of right in criminal cases were first permitted in 1889 when Congress enacted legislation providing for appellate review of convictions resulting in the death penalty. *Abney*, 431 U.S. at 656 n.3.

that the Constitution does not require the states to provide appellate courts or a right to appellate review. *See id.; accord Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

By the mid-twentieth century, appellate review of criminal convictions had become "an integral part of the . . . criminal justice system for finally adjudicating the guilt or innocence" of all defendants. *Abney*, 431 U.S. at 656. Consequently, in *Griffin*, the Court held that both the Due Process and the Equal Protection Clauses protect all appellants, including the indigent, from "invidious discriminations" in all stages of appellate proceedings. *Griffin*, 351 U.S. at 18. The Constitution requires that appellate review, once established, be "adequate and effective" as well as nondiscriminatory, even though the Constitution does not require the States to provide appeals at all. *Id.* at 18, 20. In a line of cases applying these principles, the Court recognized that certain safeguards must be established to ensure that a criminal appellant's first appeal as of right is "adequate and effective." These safeguards include the right to appointed counsel and to the effective assistance of counsel. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Douglas v. California*, 372 U.S. 353, 356 (1963).

This Court has continued to acknowledge the key role of the first appeal of right when considering how far to extend these safeguards. It has determined that appointment of counsel is constitutionally required only through the first appeal of right, and does not extend to discretionary appeals and collateral attacks. *See Austin v. United States*, 513 U.S. 5, 6-8 (1994); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Ross v. Moffitt*, 417 U.S. 600 (1974).

Thirty years after the *Griffin* decision, Justice Brennan suggested that the Court may need to re-examine the proposition that there is no constitutional right to an appeal of a criminal conviction. *See Jones v. Barnes*, 463 U.S. 745, 755-64 (1983) (Brennan, J., dissenting). In *Jones*, the majority held that a lawyer representing a defendant in a direct criminal appeal does not have a constitutional duty to raise every non-frivolous issue requested by defendant. Justice Brennan (joined by Justice Marshall) disagreed with this holding and objected to the majority's assertion that there was no constitutional right to an appeal:

> The Court surprisingly announces that "[t]here is, of course, no constitutional right to an appeal." *Ante*, at 751, 77 L. Ed. 2d, at 993. That statement, besides being unnecessary to its decision, is quite arguably wrong. In *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 89, 76 S. Ct. 585, 55 ALR2d 1055 (1956), the fifth member of the majority, Justice Frankfurter, expressed doubt that there was a constitutional right to an appeal: "[N]either the unfolding content of 'due process' nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy. It is significant that no appeals from convictions in the federal courts were afforded (with roundabout exceptions negligible for present purposes) for nearly a hundred years; and, despite the civilized standards of criminal justice in modern England, there was no appeal from convictions (again, with exceptions not now pertinent) until 1907. Thus, it is now settled that due process of law does not require a State to afford review of

criminal judgments." *Id.*, at 20-21, 100 L. Ed. 891, 76 S. Ct. 585, 55 ALR2d 1055.

> If the question were to come before us in a proper case, I have little doubt that the passage of nearly 30 years since *Griffin* and some 90 years since *McKane v. Durston*, 153 U.S. 684, 38 L. Ed. 867, 14 S. Ct. 913 (1894), upon which Justice Frankfurter relied, would lead us to reassess the significance of the factors upon which Justice Frankfurter based his conclusion. I also have little doubt that we would decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding. There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.

463 U.S. 745, 756 n.1 (citations omitted).

Justice Blackmun, writing separately, agreed that it was unclear whether a defendant had a constitutional right to an appeal:

> I do not join the Court's opinion, because I need not decide in this case . . . whether there is or is not a constitutional right to a first appeal of a criminal conviction, and because I agree with Justice Brennan, . . . that, as an *ethical* matter, an attorney should argue on appeal all non-frivolous claims upon which his client insists.

Id. at 754 (Blackmun, J., concurring in the judgment) (emphasis added).

Martinez may be a "proper case" in which to reassess whether "a State must afford at least some opportunity for review of convictions." As Justice Brennan commented in *Jones*, "a case presenting this question is unlikely to arise, for the very reason that a right of appeal is now universal for all significant criminal convictions." *Id.* at 756, n.1. The question may properly be addressed in this case because the assumption that there is no constitutional right to an appeal underlies some courts' conclusions that there is no right to self-representation on appeal. *See, e.g., Lumbert v. Finley*, 735 F.2d 239, 245 (7th Cir. 1984); *People v. Scott*, 64 Cal. App. 4th 550, 557 (1998) (*petition for cert. filed*, Dec. 28, 1998); *In re Walker*, 56 Cal. App. 3d 225, 227 (1976).[3]

Today, this assumption is questionable. Since the Court decided *Griffin* in 1955, it has continued to acknowledge the importance of appellate review in determining guilt or innocence. In *Evitts v. Lucey*, the Court wrote: "A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed." 469 U.S. at 399-400. As the Innocence Project based at Cardozo Law School has shown, a significant number of wrongful convictions occur in our criminal justice system. *See* "Forum Puts Face on Wrongful-Conviction Risk," 144

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[3] *But see People v. Ashley*, 59 Cal. 2d 339 (1963) (in automatic appeal in a death penalty case, counsel appointed over appellant's objections but appellant permitted to file *pro se* brief).

Chicago Daily Law Bulletin No. 224 (Nov. 16, 1998). Without appellate review of criminal convictions, the risk of erroneous convictions would be truly unacceptable.

The Constitution is not frozen in time. Today, criminal appellate review is universal and it has become "an integral part of determining guilt or innocence." Due process requires appellate review of all felony convictions. *See id.* at 468-69; *Evitts v. Lucey*, 469 U.S. at 399-400.

B. Even If Defendants Have No "Absolute Right" to Be Physically Present and to Argue Their Appeals in Person, They Have a Right to Present Their Claims In *Pro Se* Under Certain Circumstances.

In *Price v. Johnston*, 334 U.S. 266, 285 (1948), the Court stated that in contrast to the well-recognized right to be present at significant stages of a prosecution, "a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court." The Court acknowledged this distinction in *Faretta v. California*, 422 U.S. 806, 816 (1975), which suggests that the right to be present at significant stages of the prosecution and to represent oneself, guaranteed by the Sixth Amendment, may not extend to appeals. These decisions, however, do not foreclose the possibility that a criminal appellant may have at least a limited right to self-representation.

Price did not arise in the context of a direct appeal. It was a habeas case. Price was appealing the denial of his fourth federal habeas petition challenging a state conviction. He had no attorney and wanted to argue his appeal

in person at the Court of Appeals. 334 U.S. at 270-76. This Court held that the circuit courts have discretionary power to grant a prisoner's request to be brought to court to argue his own appeal:

> The discretionary nature of the power in question grows out of the fact that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court. The absence of that right is in sharp contrast to his constitutional prerogative of being present in person at each significant stage of a felony prosecution, and to his recognized privilege of conducting his own defense at the trial. . . . Oral argument on appeal is not an essential ingredient of due process and [the federal statutory right to argue one's own appeal] may be circumscribed as to prisoners where reasonable necessity so dictates.

334 U.S. at 285-86 (citations omitted).

The Court acknowledged that "[e]xceptional situations may arise where a circuit court of appeals might fairly conclude that oral argument by a prisoner in person is 'reasonably necessary in the interests of justice' " *Id.* at 280 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)). Where the court deemed argument essential, for example, "fairness and orderly appellate procedure demand that both parties be accorded an equal opportunity to participate in the argument either through counsel or in person." *Id.*

The Court then considered what if, in a particular case, it deems argument important, but

> one of the parties is a prisoner and has no lawyer and who desires that none be appointed to represent him, being of the belief that the case is of such a nature that only he himself can adequately discuss the facts and issues. *Since ordinarily the court cannot designate counsel for the prisoner without his consent*, an arrangement that is made for his presence and participation in the oral argument can be said to be "reasonably necessary in the interests of justice."

Id. at 280 (emphasis added).

The Court concluded that under such circumstances, a circuit court would be required, pursuant to its statutory power to issue writs "necessary" for the exercise of its jurisdiction, to permit the prisoner to argue his own appeal. *Id.*

Thus, while the *Price* opinion held that the Constitution did not guarantee an "absolute right" to argue one's own appeal in person, the Court also acknowledged that counsel could not be forced on an appellant and that circumstances might arise that would require the court, in order to perform a meaningful review, to permit a *pro se* appellant to argue in person.

C. Because Appellate Counsel Is Not Required to Raise Every Non-Frivolous Issue, Appellants Should Be Permitted to Present Claims Not Briefed by Counsel to the Court.

Many lower courts have concluded that even though appellants have no constitutional right to argue their appeal in person, they have a right to file *pro se* briefs and motions. *See, e.g., Vega v. Johnson*, 149 F.3d 354, 361 (5th

Cir. 1998) (although extent of right of self-representation on appeal is unclear in Texas and in the Fifth Circuit, "[a] defendant does have a right to submit briefs pro se on appeal") (citing *Myers v. Collins*, 8 F.3d 249, 252 (5th Cir. 1993); *United States v. Gillis*, 773 F.2d 549, 560 (4th Cir. 1985) (court denied appellant leave to proceed *pro se* and appointed counsel, but permitted appellant to file a *pro se* supplemental brief); *Chamberlain v. Erickson*, 744 F.2d 628, 630 n.5 (8th Cir. 1984) (no constitutionally protected right to argue in person but appellants have right to file *pro se* briefs and motions); *Horton v. Dugger*, 895 F.2d 714, 718 (11th Cir. 1990) (*habeas* petitioner was not denied right to self-representation on direct appeal, where the record did not indicate that he was denied permission to file a *pro se* brief (citing *Chamberlain*)); *Hines v. Enomoto*, 658 F.2d 667 (9th Cir. 1981) (appointed counsel not improperly forced upon appellant in state appellate proceedings where appellant allowed to file supplemental brief).

This distinction between argument and briefing is sound. Even if the right to self-representation in a "criminal prosecution" guaranteed by the Sixth Amendment does not extend to the direct appeal of a conviction, appellants may have a constitutional right to present to the court, in writing, claims that they may be unable to present through counsel for a variety of reasons. Counsel may decline to press certain claims. The Court has held that counsel has no constitutional duty to present every non-frivolous claim an appellant wishes to raise, and does not provide ineffective assistance by selecting the claims that counsel believes are the strongest. *Jones v. Barnes*, 463 U.S. 745 (1983). Yet today, if a claim is not raised on direct appeal, and appellant cannot establish

that appellate counsel was ineffective in not raising it, the chances of obtaining review of that claim on the merits in habeas proceedings are slim in many jurisdictions. A supplemental *pro se* brief may be the only way for an appellant to preserve potentially meritorious claims for further post-conviction review.

Where appellate counsel declines to press an innocence claim or other claims that appellant wants to raise, where a conflict arises between lawyer and client, or where counsel renders ineffective assistance, substitution of counsel should be possible, but in practice it is not always granted. Moreover, appellants who can afford to hire an attorney will have more control over the way their cases are presented than do people who are represented by appointed counsel. *See Jones*, 463 U.S. at 757-58 n.2 (Brennan, J., dissenting). Given this reality, the Equal Protection Clause, as well as the Due Process Clause, require that an indigent appellant be allowed to file a supplemental brief presenting issues his lawyer chooses not to raise. Leave to argue in person, *pro se*, need be granted only if argument is necessary to decide the case and appellant believes his interests cannot be represented adequately through counsel.

D. The Right to Self-Representation, Like the Right to Counsel, Reflect Fundamental Values Requiring That the Dignity and Autonomy of the Individual Be Respected in Criminal Proceedings.

In *Jones v. Barnes*, Justice Brennan offered several examples of possible reasons why an appellant would want to proceed *pro se*:

> [Appellant] may want to press the argument that he is innocent, even if other stratagems are more likely to result in the dismissal of charges or in a reduction of punishment. He may want to insist on certain arguments for political reasons. He may want to protect third parties. This is just as true on appeal as at trial. . . .

463 U.S. at 759. Pressing a claim of innocence could, of course, be of paramount importance to a defendant who later seeks federal *habeas* review of his conviction.

Regardless of the claims involved, the right to counsel

> . . . is more than a right to have one's case presented competently and effectively. It is predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant. . . .

Jones v. Barnes, 463 U.S. at 758 (emphasis added). This is just as true on appeal as at trial.

As Justice Brennan pointed out so eloquently in *Jones*, *Anders* reflects this same view. When appointed counsel believes there are no meritorious issues to raise on appeal, counsel must prepare a brief "covering all arguable grounds for appeal so that the client may 'raise any points that he chooses.' " *Id.* (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)). This approach protects the right to counsel without impairing the right of self-representation.

The right to counsel, important as it is, "is intended to supplement the other rights of the defendant, and not to impair the 'absolute and primary right to conduct one's own defense in propria persona.' " *Faretta*, 422 U.S. at 817 (quoting *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964)). Whatever the relative importance of the specific rights enumerated in the Bill of Rights, they are all intended to protect the dignity and autonomy of each person. These basic values are applicable on appeal, just as they are at trial. *See Anders*, 386 U.S. at 742.

E. The Right to Self-Representation Should Not Be Used to Undermine the Right to Effective Assistance of Counsel.

NACDL is concerned about protecting and preserving the right to assistance of counsel on appeal. Conflicts between lawyer and client or other circumstances sometimes make it impossible for counsel to render effective assistance. Sometimes courts deny reasonable requests for substitution because they want to avoid delays and to contain the cost of legal services to indigent appellants. At times, it may be difficult for the court to evaluate

whether the reasons for requesting substitution are valid, because appellant and his lawyer cannot reveal much information about the nature of their differences. Despite these problems, courts should look carefully at requests for substitution of counsel and consider whether the right to effective assistance is implicated. Appellants should not be forced to choose between ineffective assistance of counsel and proceeding *pro se*, *see Hendricks v. Zenon*, 993 F.2d 664 (9th Cir. 1993), nor should they be denied assistance of counsel in the name of the right to self-representation.

CONCLUSION

If the Court recognizes a right to self-representation on appeal, safeguards similar to those set forth in *Faretta* should be required. A waiver of the right to appointed counsel should be accepted only if it is express, unequivocal, knowing and voluntary; if the dangers and disadvantages of self-representation have been explained and understood, and if appellant is capable of presenting appeal to the court in writing. *See Baker v. Kaiser*, 929 F.2d 1495 (10th Cir. 1991); *Campbell v. Blodgett*, 940 F.2d 549 (9th Cir. 1991).

Dated: June 30, 1999

Respectfully submitted,

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